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February 5, 2013

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Office of the Governor
State Capitol - Room 400
Santa Fe, New Mexico 87501

Re: Inspection of Public Records Act Complaint – Mr. Joey Peters

Dear Mr. Stackpole:

Thank you for your response regarding the Inspection of Public Records Act ("IPRA") complaint filed by Mr. Joey Peters. Mr. Peters alleges that the Governor's Office withheld certain public records, following his request to inspect electronic messages for certain dates from the private e-mail accounts of Governor Susana Martinez, Chief of Staff Keith Gardner, Deputy Chief of Staff Ryan Canglioni, and Communications Director Scott Darnell. More specifically, Mr. Peters alleges that he submitted an IPRA request to the Governor's Office for "[a]ll emails sent from and received by keithgardner@susanapac.com, sdarnell@susanapac.com, rmkcang@yahoo.com, gardners90@yahoo.com and Gov. Susana Martinez' Susana Pac email address from the following dates: August 17, 2012; May 2, 2012; and June 13, 2012." In its response to his request, Mr. Peters alleges that the Governor's Office withheld at least one widely publicized e-mail - a May 2, 2012 electronic message from Public Education Department spokesman Larry Behrens to Messrs. Gardner, Darnell and others about a teachers list - as well as e-mails the Governor may have received in response to her August 17, 2011 deadline for responses to her questions about the Department of Corrections and a matter referred to as the Mansfield escape. Mr. Peters also alleges that the Governor's Office did not adequately and timely respond to his request. As discussed in more detail below, we believe that the Governor's Office's response to Mr. Peters was insufficient because it did not clearly cover any responsive public records in the private e-mail accounts specified in the request.

As a preliminary matter, IPRA codifies the state's public policy that "[e]very person has a right to inspect public records of this state," with certain exceptions. See NMSA 1978, Section 14-2-1(A). Under IPRA, public records are all documents, papers, letters, books, maps, tapes, photographs, recordings and other materials, regardless of physical

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form or characteristics, that are used, created, received, maintained or held by or on behalf of any public body and relate to public business, whether or not the records are required by law to be created or maintained. See NMSA 1978, § 14-2-6(E). The primary purpose of IPRA is to provide access to public records rather than "to create an evidentiary shield behind which the government can hide." See *Estate of Romero v. City of Santa Fe*, 2006-NMSC-028, ¶ 18, 139 N.M. 671, 677 (2006) (citations omitted).

If e-mail is used to conduct public business, the e-mail is a public record, without regard to whether the e-mail is created or maintained on a public or private e-mail account. The person using the private account to discuss public business is in effect using, creating, receiving, maintaining or holding a public record on behalf of the public body, in this instance the Office of the Governor. See *Inspection of Public Records Act Compliance Guide*, p. 25 (2012); see also, 1.13.4.11 NMAC (June 29, 2007) (electronic messages may include e-mail messages properly classified as public records). To the extent that the requested e-mail correspondence exchanged by Governor Martínez and others on their susanapac or other private e-mail accounts relates to the conduct and administration of public business, there is no question that those e-mails are public records and the failure to provide Mr. Peters with the opportunity to inspect those e-mails violates IPRA, unless any or some of the responsive e-mails also fall within one of IPRA's exceptions to inspection.

IPRA also provides that "[i]f a custodian determines that a written request is excessively burdensome or broad, an additional reasonable period of time shall be allowed to comply with the request. . . . The requester may deem the request denied and may pursue the remedies available pursuant to the Inspection of Public Record Act if the custodian does not permit the records to be inspected in a reasonable period of time." See NMSA 1978, § 14-2-10. IPRA does not define what may be "excessively burdensome or broad," or what may be a "reasonable period of time," as perhaps a legislative acknowledgment that what constitutes an "excessively burdensome or broad" request or what may be a "reasonable time" for inspection will vary according to the request.

In this instance, the e-mail correspondence between Mr. Peters and the Governor's Office following his June 20, 2012 request indicates that after acknowledging receipt of Mr. Peters' request to inspect certain e-mails on June 25, 2012, Pamela Cason, Records Custodian for the Office of the Governor, informed Mr. Peters on July 5, 2012 that "[d]ue to the broad and burdensome nature of your request, the Office will need additional time to respond as allowed by NMSA 1978, § 14-2-10." We recognize that many or some of the requested e-mails may not have been readily available to Ms. Cason because the e-mails were sent by or transmitted to the various public employees not through their public e-mail accounts but through their private e-mail accounts. It is therefore understandable that Ms. Cason may have needed additional time to research and collect responsive e-mails, if any. However, Ms. Cason did not indicate how much additional time the

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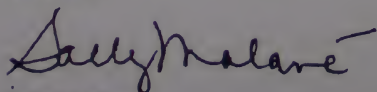
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Governor's Office needed to respond to Mr. Peters' request and nor did she communicate further with Mr. Peters until after Mr. Peters inquired about the status of his IPRA request on August 7, 2012. One week later, on August 14, the Governor's Office provided to Mr. Peters a copy of one e-mail it believed to be responsive to his request. In her transmission, Ms. Cason did not indicate that the Governor's Office was withholding or denying any responsive public records and your response to our inquiry states the "Office of the Governor did not withhold or deny any responsive public documents held by our Office under any privilege or statutory exception." That may be true with respect to the Office of the Governor, but Ms. Cason's response did not make clear whether Governor Martinez, Chief of Staff Keith Gardner, Deputy Chief of Staff Ryan Canglioni, and Communications Director Scott Darnell had e-mails created or maintained in their respective susanapac or other private e-mail accounts that also were responsive to Mr. Peters' request. As stated earlier, e-mails held by public employees in private e-mail accounts may be deemed public records subject to inspection under IPRA if they relate to public business and are created or maintained on behalf of a public body. Therefore, we urge Ms. Cason to confer with Governor Martinez, Chief of Staff Keith Gardner, Deputy Chief of Staff Ryan Canglioni, and Communications Director Scott Darnell and solicit e-mails from their respective susanpac or other private e-mail accounts as identified in Mr. Peters' request.

As you are aware, failure to comply with IPRA subjects the non-compliant public body to certain monetary penalties, as described in Section 14-2-11(C). Damages in the amount of up to \$100 per day from the day the public body is non-compliant until a written denial is issued may be awarded unless the public body shows its failure to provide a timely explanation of denial was reasonable. Thus, to avoid the potential liability resulting from the Office of the Governor's noncompliance, the requested records or a denial letter that includes all the information required by Section 14-2-11(C) should be sent to Mr. Peters immediately, unless these already have been provided. Please provide us a copy of any correspondence establishing that the public records have been produced or denied inspection.

Thank you for your cooperation in resolving this matter. Should you have any questions concerning our determination, please let us know.

Sincerely,



Sally Malavé

Assistant Attorney General

Cc: Mr. Joey Peters, Santa Fe Reporter